IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Mr. Justice Md. Nizamuddin

WPA No. 22712 of 2017

M/s Himadri Speciality Chemical & Anr.
Vs
The Commissioner of Central Excise, Kolkata – IV Commissionerate & Ors.

For the Petitioners :- **Mr. Avra Mazumder, Adv.**
Ms. S. Kejaria, Adv.

For the Respondents :- **Mr. U. S. Bhattacharya, Adv.**
Mr. Abhradip Maity, Adv.

Judgement On :- **05.01.2024**

MD. NIZAMUDDIN, J.

Heard learned advocates appearing for the parties.

In this writ petition subject matter of challenge is the impugned show cause cum Demand Notice being No. 13/Commr./2016 dated March 28, 2016 and the Order-in-Original being No. 22/COMMR/CGST&CE/HWH/Adjn/2017-18 dated November 30, 2017 passed during pendency of this writ petition, by way of supplementary affidavit, by the leave of this Court.

Question of law involved in this writ petition is as follows:

(i) Whether lean gas/waste gas containing carbon monoxide which is poisonous gas and being neither marketable nor stable nor transportable to other location and which is generated during the process of manufacture of carbon black, after incineration of the

same, in observing pollution laws and to prevent the atmosphere being polluted and not being subjected to excise duty, can be made excisable on the ground that in course of incineration of the said lean gas considerable amount of heat is generated which is used in generation of electricity which is partly for captive consumption and is partly sold?

Facts involve in brief, in the instant case according to the petitioner, are as hereunder:

Petitioner is a manufacturer of "Carbon Black" since March 27, 2009. During the process of manufacture of Carbon Black, a Waste Gas/Off Gas/Tail Gas (hereinafter referred to as the said gas) emerges as a by-product and having regard to the environmental norms and pollution laws, petitioner incinerates the said gas so as to prevent emission of toxic materials, i.e., Carbon Monoxide (hereinafter referred to as CO) and other hydrocarbons. Considerable amount of heat is generated in incinerating the said gas which is used in generation of electricity partly for captive consumption and is partly sold.

A spot memo dated 24th June, 2013 was issued by the Excise Audit Team. At page 9 of the said Spot Memo it was recorded that the said gas can itself be processed and used as a fuel in an industrial reciprocative engine. So, this waste has the marketability and is to be treated as an excisable product.

Petitioner responded to the said Audit Memo by a reply dated March 26, 2014 as appears at Page 123 of the writ petition wherein it was contended that the said gas is generated during the process of manufacture of Carbon Black and a captive power plant had been set up to avoid the surroundings being polluted from CO contained in the waste gas. It further contended that the said waste gas is neither marketable nor storable nor transportable to other locations and has got no value because it has no alternative use. In the said reply, the petitioner relied on the Circular No. 35/88 dated December 22, 1988

and a judgment rendered by the jurisdictional Tribunal in the case of Philips Carbon Black -Vs- CCE, 111 ELT 835.

Petitioner submits that Ministry of Finance, Department of Revenue, issued a Circular wherein it was clearly observed that a mixture of crude gases obtained in the manufacture of Carbon Black and released into the atmosphere after incineration of CO contained need not be subject to duty of excise.

On March 29, 2016, respondent concerned issued a show cause notice under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as the Act) primarily on the ground that since the said gas is used in the generation of electricity, which is subject to Nil rate of duty and non-excisable and/or exempted goods under the Act, the said gas is marketable and therefore, excisable.

Petitioner filed the present writ petition challenging the validity and/or legality of the said show cause notice. During the pendency of the present writ petition, the respondent authority concerned proceeded with the adjudication proceeding in spite of repeated request of the petitioner. The petitioner prayed for repeated adjournments and to keep the proceedings in abeyance till the disposal of the writ petition yet the adjudicating authority passed Order-in-Original, dated November 30, 2017 during pendency of this writ petition raising a demand of Rs. 20,61,27,457/- under Section 11A(10) of the Act read with Section 174 (2) of the CGST Act along with interest under Section 11AA of the Central Excise Act read with Section 174 (2) of the CGST Act along with a penalty of Rs. 20,61,27,457/- under Section 11AC of the Act read with Rule 25 of the Rules read with Section 174 (2) of the CGST Act.

After passing of the order-in-original, petitioner made an application for amendment of the present writ petition seeking to challenge the said order-in-original. By an order dated July 5, 2018, this Court allowed the said amendment application. Affidavits were exchanged by the parties. It is

pertinent to note that the Respondent Authorities did not oppose the said amendment application.

Case made out by the adjudicating authority in the impugned order-in-original is as hereunder.

Electricity being manufactured and also being capable of being bought and sold for a consideration would fall in the category of “goods”. So far it is exempted as it is chargeable to Nil rate of duty. Petitioner is engaged in the manufacture of dutiable goods “Carbon Black” as well as exempted goods “Electricity”. The activity of generating electricity is not an ancillary activity. It is an intentional activity. The said gas is nothing but a mixture of gases and a composite goods. The said gas is used for generation of electricity as it contained mainly hydrocarbon gases. Respondent authority concerned held that the said gas would fall under the residuary tariff entry being No. 27112900 and is an excisable product.

Respondent authority concerned proceeded to ascertain the value on the corroborative source, i.e., value at which electricity is sold plus the value of the same consumed by them. Respondent authority concerned also held that the extended period of limitation is applicable in the facts and circumstances of the case and demanded Central Excise duty amounting to Rs. 20,61,27,457/- and penalty of equal amount.

Challenging the impugned order-in-original, petitioner submits that there is no finding in the order-in-original that the said gas satisfies the twin test of manufacture and marketability in order to attract levy under Section 3 read with Section 2 (d) of the Act and that there is no finding that the said gas was manufactured and cleared by the petitioner to attract levy.

Petitioner submits that the petitioner is engaged in the manufacture of the said gas. The said gas is not at all dutiable under the Excise Law. The said gas has been arbitrarily classified under the residuary entry being No. 27112900. Petitioner submits that the impugned order is contrary to the binding relevant

circulars of CBEC and the extended period of limitation under proviso to Section 11A (1) of the Act could not have been invoked in the facts and circumstances of the present case.

Petitioner submits that its objection to the validity of the order-in-original on several grounds has been deal with in a mechanical rebuttal and none of the grounds taken by the petitioner has been dealt with specifically.

Petitioner submits that alternative Remedy in the facts and circumstances of the case against invoking of jurisdiction under Section 11A of the Act is not a bar and as such it has sought to challenge the impugned order-in-original by amending the present writ petition by the leave of the Court which was not opposed by the Respondents as would be evident from the order dated July 5, 2018. Therefore, the respondents are precluded from raising the question of maintainability at this belated stage.

Petitioner submits that it is evident from the order-in-original that none of the condition precedents for assumption of jurisdiction under Section 11A of the Act stood satisfied in the present case.

Petitioner submits that the said gas was generated as a by-product which the petitioner had to incinerate to comply with environmental norms and the heat so generated in the process of incineration was used for the purpose of production of electricity which was partially used to captive consumption and partially sold to the grid was known to the Department as would be evident from the Audit Proceedings stated hereinabove.

Petitioner submits that it is no longer res integra that the expression “suppression” used in Section 11A of the Act being accompanied by strong words like “fraud” or “collusion” would have to be construed strictly. Mere omission to give correct information is not suppression of facts. The burden to prove suppression of facts is cast upon the Revenue. The department cannot take a view contrary to the Circular being No. 35/88 dated December 22, 1988 wherein it was clearly held that the said gas is not excisable.

On the said issue whether the said gas is excisable in view of the amended definition of excisable goods contained in Section 2 (d) of the Act, Section 2 (d), as amended is set out herein below:

["excisable goods" means goods specified in the Fourth Schedule as being subject to a duty of excise and includes salt;

Explanation – For the purposes of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable.]

Petitioner submits that the explanation to the said definition provides that goods would also include any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable. Therefore, the legal fiction is created in the said explanation. The condition precedent for pressing into service the said legal fiction would be to ascertain whether the goods is capable of being bought and sold for a consideration.

Petitioner submits that though in the impugned order-in-original, it has been held by respondent authority concerned that lean gas is marketable and therefore, excisable, however, there is no finding that lean gas with CO content is capable of being bought and sold for consideration.

Petitioner submits that the said finding that the said gas is marketable, arrived at by the respondent authority concerned is without any material basis since no instance has been cited by respondent authority concerned as to whether the said gas with CO content is capable of being bought and sold in the market for a consideration and therefore, the explanation to Section 2 (d) of the Act as inserted in 2008, does not improve the case of the Revenue.

Petitioner submits that in the case of Hi-tech Carbon –Vs- CCE, 2018 (17) GSTL 398, it has been held by the Division Bench of the Allahabad High Court that the said gas emerges by way of technological necessity and since

these gases have high content of CO which is a hazardous gas could not be released freely into the atmosphere and therefore, the CO content in the said gas has to be burnt before it is released into the atmosphere. It has been further held that the process of burning CO is a separated and independent process totally disconnected with the process of manufacture of Carbon Black.

Petitioner submits that in the case of UOI –Vs- DSCL Sugar, (2020) 20 SCC 593, the Supreme Court had the occasion to consider Explanation to Section 2 (d) of the Act as would be evident from paragraph 6 of the judgment and also the definition of 'manufacture' as would be evident from paragraph 7 of the said judgment. The Supreme Court clearly held in the said case that it could not be pointed out whether any process in respect of bagasse has been specified in the Section or in the Chapter notes and in the absence thereof, the deeming provision could not be attracted.

Petitioner submits that similarly, in the present case, respondent authority concerned has not been able to point out any relevant provision contained in the Section or in the Chapter notes wherefrom it could be established that any process in respect of the said gas has been specified.

Petitioner submits that the Respondent authority concerned proceeded to levy excise duty on the said gas after ascertaining the taxable value with regard to electricity captively consumed and sold to the grid. This approach of respondent authority concerned makes it manifestly clear that the focal point of adjudication is the production of electricity for captive consumption and sale to the grid and since electricity was subject to Nil rate of duty, respondent authority concerned sought to levy duty on a product which was never intended to be manufactured by the petitioner and which under no circumstance, is marketable because of its high CO content.

Petitioner submits that it is no longer res integra that what cannot be done directly cannot also be done indirectly.

Petitioner submits that in the petitioner's own case reported in 2022 (7) TMI 1177, the Division Bench of this Hon'ble Court has relied on the judgment rendered by the Allahabad High Court in the case of Hi-Tech Carbon (supra) and quoted the findings arrived at by the Tribunal. Wherein it was observed that the Tribunal noted that what is generated in the process of manufacture of Carbon Black is waste gas and the petitioner is mandated to use the said waste gas for generating electricity as the said gas cannot be flared into the open air as it would cause pollution.

Petitioner submits that the Division Bench of this Court has relied on the judgment rendered by the Supreme Court in the case of DSCL Sugar (supra and it had the occasion to consider the amended definition of excisable goods. Therefore, it is apparent that the said judgment rendered by the Division Bench is now final between the parties since the Revenue has not been able to point out as to whether any further appeal has been carried by the Revenue to the Hon'ble Supreme Court against the aforesaid order of the Division Bench of this Court.

Petitioner submits that having regard to the facts and circumstances in the case of Philips Carbon Black (supra), the Tribunal in no uncertain terms has held that incineration of lean gas is necessary as release of the gas into atmosphere would cause environmental pollution. During the process of burning CO gas out of the said gas, certain amount of heat is generated and the CO gas is in unmarketable condition.

Petitioner submits that the Tribunal also considered the Circular No. 35/88 dated December 22, 1988 in its judgment in the aforesaid case and clarified that incineration or burning of lean gas is necessary to meet the requirement of pollution laws and the Department accepted the judgment rendered in the case of Philips Carbon Black (supra) by the Tribunal, as would be evident from the reply made to the application under RTI Act.

Petitioner submits that the judgment rendered by the jurisdictional Tribunal in the case of Philips Carbon Black (supra) has attained finality and the facts in Philips Carbon Black (supra) and Hi-tech Carbon (supra) are similar to the facts and circumstances of the present case.

Petitioner submits that the department cannot take a stand contrary to the Circular in view of the Hon'ble Supreme Court's judgment in the case of Ranade Micronutrients –Vs- CCE, (1996) 10 SCC 387. Petitioner submits that the said gas is not capable of being bought and sold for a consideration which is a condition precedent for excisability of goods.

Learned counsel representing the respondents, in opposing the writ petition submits as hereunder.

Respondents submit that the writ petitioner challenged the show cause cum Demand Notice dated 28th March, 2016 and the order-in-original dated 30th November, 2017 without filing any reply to the said show cause notice and without participating or attending the hearing before the adjudicating authority despite several opportunities were given and as such the said order-in-original dated 30th November, 2017 was accordingly passed ex parte and the writ petitioner did not prefer any appeal against the said order-in-original and on that ground this writ petition is liable to be dismissed.

Respondents submit that the impugned show cause notice was issued under proper authority and the same was neither without jurisdiction nor violative of the principles of natural justice and the order-in-original passed therein is binding on the petitioner and thus this writ petition is not maintainable.

Respondents further submit that during the manufacture of dutiable goods, i.e. "Carbon Black", off gas or Tail gas is also produced as a by product which is further used by the petitioner in manufacture of electricity. The electricity so manufactured is partly used for captive consumption in the plant of the petitioner and a part of it was sold to the West Bengal State Electricity

Distribution Company Ltd. and earned a huge amount from the WBSEDCL on commercial basis. Such sale of Electricity can be termed as clearance of dutiable excisable goods and the petitioner is liable to pay the Central Excise duty including cess for the year 2011-12. The off gas or Tail gas is nothing but a mixture of hydrocarbon gases viz, hydrogen gas, Nitrogen gas, Carbon Monoxide gas etc. and as such it is a composite goods and the said gas is falling under Tariff sub-heading No. 27112900 and it has significant energy value or it contains combustible gas components and the said gas can be used as a fuel in an industrial reciprocating, where from the petitioner is manufacturing electricity and earning a huge amount by selling the same commercially.

Respondents submit that Excisable goods are defined in Section 2(d) of the Central Excise Act, 1944, which reads as follows:- "Goods specified in the first schedule and the second schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt."

(a) Therefore in order to qualify under the category of "excisable goods", it should be specified in the First Schedule and Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise. In the instant case, electricity is specified in CETH 27160000 of the First schedule to the CETA, 1985, as subject to duty at the rate stipulated. However in case of electricity no rate is specified as the column relating to rate of duty is Nil.

(b) The explanation to Section 2(d) of the Central Excise Act, 1944 read as follows: "For the purpose of this clause, "goods" includes any article, material or substance which is capable of being bought and sold for a consideration and such goods shall be deemed to be marketable."

Thus the electricity being manufactured and also being capable of bought and sold for a consideration will fall under the category of Goods.

(c) The terms 'rate of duty' is a numeric term specified in tariff for the purpose of arriving at quantum of duty. In case of ad-valorem rate, duty is determined as a percentile of value of the goods in terms of Section 4 or 4A of the Central Excise Tariff Act, 1985.

Respondents submit that undisputedly, the electricity is a tariff item as specified in the first schedule to Central Excise Tariff and the same is chargeable to duty. Therefore, electricity is excisable goods in items of Section 2(d) of the Central Excise Act, 1944. Further the electricity manufactured by the petitioner is their intentional activity and therefore this activity cannot be termed as an ancillary activity.

Respondents further submit that the petitioner was requested by the audit team as well as by Rang formation repeatedly to ascertain and submit particulars for five years period in respect of the quantity, value and duty involvement as per statute on such off gas consumed by them for generation of electricity. Even summons under Section 14 of the Central Excise Act, 1944 had been issued to the said petitioner twice on dates 23-12/2015 & 28/01/2016 asking them to produce specified documents/records in respect of, inter alia, off gas/waste gas consumed captive to produce electricity. But the petitioner did not come up with reasonable reply or submitted the particulars asked for by the department, nor even did it attend the schedule summons to evade payment of duty. However, the partial figures for electricity sold/supplied to the grid have been submitted only on 29/02/2016 though not for the entire period and without showing the rate per unit sold with supporting documents. Units of electricity consumed within the premises have not been intimated by the petitioner despite requests made.

Respondents submit that the petitioner's unit has captive power plant which generate power as shown in col. (2) of the Annexure enclosed to the notice as per petitioner submission dated 29/02/2016. Total generated power has been converted into unit consumed captively plus surplus sold to the grid.

Value of electricity has been ascertained on the basis of value of surplus units sold to WBSEDCL @ Rs.3.21 per unit as per para 2.4 of the order of the West Bengal Regulatory Commission in case no. WBERC/PPA-55/11-12 and thereby the petitioner is liable to pay Excise duty plus Education cess amounting to Rs. 20,61,27,457/- together with interest and same amount of penalty.

Respondents submit that the details of such irregularities came to light only after scrutiny of records/documents during audit and after follow up action thereof. Had it not been unearthed by the department officers, it would have remain suppressed forever. Beside, the said petitioner having full knowledge of inadmissibility of the benefit of exemption notification 67/95 dated 16/03/1995, did not pay the duty leviable on it and suppressed this fact deliberately with the intent to evade payment of duty. Thus the petitioner has contravened the provisions of Rule 4,5,6,8 & 12 of Central Excise Rules 2002, and, invocation of extended period for recovery of Govt. dues along with interest is squarely applicable with imposition of penalty.

Respondents submit that in 3rd paragraph of the circular dated 22/12/1988 of CBEC (Page – 130 of the writ petition) specifically said that even if they are held to be excisable then by virtue of notification dated 20/06/1987 the gases in question are exempted from the duty provided such gases are allowed to escape into the atmosphere by flared system or otherwise while in the present case petitioner did not allow to escape the off gas into the atmosphere by flared system or otherwise but manufactured electricity and commercially sold to the WBSEDCL on valuable consideration and earned a huge amount without paying anything to the Department of Revenue. It has been mentioned in the last two lines of paragraph no. 2 of that circular that no product is obtained out of incineration of carbon monoxide and released into the atmosphere. Therefore, the said circular will not help the petitioner since the petitioner used the said off gas for manufacturing/producing electricity being an excisable goods within the meaning of Section 2(d) of the Central

Excise Act, 1944 and sold the same to the WBSEDCL on consideration and thus the petitioner is liable to pay excise duty to the department of Revenue.

Respondents further submit that in paragraph no. 10 of the judgment relied upon by the petitioners reported in 1999 (111) ELT 835 (Cal-Tribunal) (Phillips carbon Black Ltd Vs Commissioner of Central Excise) the ld. Tribunal has held that upon burning of carbon monoxide gas certain heat is generated which is used by them for their rotaters in the manufacturing operation. It has been further held in paragraph no. 13 that it has been clearly laid down in the circular dated 22/12/1988 that such mixture of crude gases released to the atmosphere after incineration of carbon monoxide content need not be subjected to duty of excise. Therefore, the said case is not applicable in the present case.

Respondents submit that in the judgment reported in (2007) 10 SCC 337 (Continental Foundation Joint Venture holding, Nathpa, H.P. Vs Central Excise, Chandigarh -1) the Hon'ble Apex Court held that suppression means failure to disclose full information with intent to evade payment of duly extended period of limitation depend upon suppression of facts. In the present case the petitioner wilfully suppressed the material facts of huge quantity of selling of electricity to the WBSEDCL despite receipt of summon under Section 14 of the Central Excise Act, 1944 with an intention to evade the duty.

Respondents further submit that the judgment reported in (1996) 10 SCC 387 (Ranadey Micronutrients Vs Collector of Central Excise) relied upon by the petitioner relating to the classification of micronutrients for the purpose excise duty and the binding effect of the Board's circular and as such the same is not applicable in this case.

Respondents submit that in the judgment reported in 2018 (17) GSTL 398 (ALL) (Commissioner of Central Excise, Allahabad Vs Hi-Tech Carbon) the Hon'ble Court held that the burning of carbon monoxide generated heat by which assessee generated steam from demineralised raw water with caustic

soda and hydrochloric acid and the steam was not produced directly from the said gas and as such the said judgment is not applicable in this case.

Respondents submit that in the judgment reported in (2020) 20 SCC 593 (Union of India Vs DSCL Sugar Ltd.) the Hon'ble Apex Court held that Bagasse is an agricultural waste and residue, which itself is not the result of any process and not manufactured product and the said judgment by the said Hon'ble Court is related to the period before 2008. It has been further held that as per explanation "goods" in 2(d) of Central Excise Act, 1944 introduces the deeming fiction by which certain kind of goods are treated as marketable and thus excisable. But Bagasse is not capable of being bought and sold for a consideration.

Respondents submit that similar view was also taken by the Hon'ble Apex Court in the case of (Gularia Chini Mills Vs Union of India) reported in 2015 (322) ELT 769 (SC). Therefore, the said judgment is not applicable in the facts of the present case because the petitioner herein is manufacturing electricity and sold the part of the same on consideration and earning a huge amount without paying duty on such excisable goods to the revenue.

Respondents further submit that the unreported judgment of the Division Bench of this Court in the case of (Principle Commissioner of CGST & CX Vs M/s Himadri Speciality Chemical Ltd.) in CEXA. No. 01 of 2022 is relating to the case of reversal of cenvat credit availed on inputs services though the assessee has already reversed the proportionate credit attributable to sale of electricity without following the prescribed Rules, 2004. The ld. Tribunal held that the assessee would be liable to reverse credit with effect from 1st March, 2015 which was affirmed by this Hon'ble Court. Therefore, the said judgment is also not applicable in this case.

I have considered the facts and circumstances of the case as appears from record, relevant provisions of law, relevant circulars, submission of the parties and judgments referred hereinabove which have been relied upon by

them and on considering the same and taking into consideration a very vital unignorable aspect that initial subject matter of challenge in this writ petition was impugned show cause notice which culminated into impugned ex-parte final adjudication order which has been passed during pendency of this writ petition and though it appears from record that several opportunities were given to the petitioner to file objection/reply to the impugned show cause notice and for hearing before passing the impugned adjudication order, but since it is the case of the petitioner that it had immediately filed this writ petition against the impugned show cause after receipt of same, petitioner thought it proper to not to give any reply to the same or to participate in the impugned proceeding and all the legal and factual points in challenging the impugned show cause and adjudication order it has taken in this writ petition, supplementary affidavit, and in course of hearing of the same against the impugned show cause notice and order-in-original could not be taken before the adjudicating authority, I am inclined to set aside the aforesaid impugned ex parte adjudication order dated 30th November, 2017 and to remand the matter back to the adjudicating authority concerned to pass fresh adjudication order by allowing the petitioner to file objection against the impugned adjudication order by treating the same as show cause notice and to take all the points raised in this writ petition and supplementary affidavit, the judgments and relevant circulars and notifications petitioner intends to rely in support of its case and after giving opportunity of hearing to the petitioner or its authorised representatives within two weeks from date and final adjudication order shall be passed within four months from the date of receipt of such objection/reply by observing principles of natural justice.

Accordingly this Writ Petition being WPA No. 22712 of 2017 is disposed of. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)